IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MAKHANDA]

CASE NO. CA&R58/2022

In the matter between:

ESTELLE BURGESS **Appellant**

and

THE STATE **Respondent**

JUDGMENT

JOLWANA J:

[1] The appellant, having been charged with and convicted on 972 counts of fraud, was convicted and sentenced to 15 years direct imprisonment. She was granted leave to appeal to this Court against that sentence. The appeal is on the basis that the said sentence is unduly excessive to the extent of being disturbingly inappropriate. She also raises, pointedly, the court *a quo*'s reliance on hearsay evidence without dealing with and making a ruling on its admissibility which it was contended was a misdirection. The issue in this appeal is whether the evidence of the State witness, Mr Harilal, who had been called to give evidence in aggravation of sentence was hearsay evidence. If so, whether there was any misdirection in how the court *a quo* dealt with his evidence. Finally, this Court must determine whether

in any event, the sentence of 15 years direct imprisonment was appropriate. I start below with the background leading up to the said sentence.

[2] The appellant was arraigned in the Specialized Commercial Crimes Court in Gqeberha on 972 counts of fraud, alternatively theft, all relating to her activities as an employee of the Eastern Cape Training Centre (ECT) where she was employed as a creditor's clerk. The appellant was under the direct supervision of Mr Faisal Ackerdien, the financial manager of ECT. Only the two of them had access to ECT's online internet banking payment system. One of her duties was to assist the financial manager in making payments to ECT's creditors. This entailed the preparation of remittance advices, creation of spreadsheets which included the creditors' banking details, the names of the creditors, the amounts that were due to them for payment and a summary sheet with all the invoices of the creditors.

[3] The appellant would prepare all these documents and present them to the financial manager who would then authorise the payments. The financial manager, relying on the information prepared by the appellant, would release the payments and pay the creditors. The modus operandi employed by the appellant in committing these offences was that she had several bank accounts held in her name or under her control with all the four major banking institutions in South Africa. She would substitute the banking details of ECT's creditors with her own banking details resulting in large amounts of money being paid to the said bank accounts by ECT. In so doing, the appellant ensured that an amount in excess of R13 million was paid into her bank accounts from March 2005 until about September 2014.

[4] The appellant, through her legal representative, informed the court that she was pleading guilty on all the charges preferred against her. The statement in terms of

section 112 of the Criminal Procedure Act, 51 of 1977 was read into the record in terms of which she admitted all the elements of the charges as detailed in the charge sheet and pleaded guilty to the almost 1000 counts of fraud committed over a period spanning some 9 years or so. She was thereupon convicted on the basis of her plea of guilty as set out in her section 112 statement and was sentenced to a term of 15 years direct imprisonment. She thereafter applied for and was granted leave to appeal to this Court against the sentence of 15 years imprisonment imposed by the trial court.

[5] The evolution of the sentence proceedings preceding the sentence that was ultimately imposed by the court was more or less the following. Pre-sentence reports were obtained and the court was informed that the appellant would not testify in mitigation of sentence. The State then indicated that if the appellant did not testify some of the contents of the pre-sentence reports would constitute hearsay evidence as they relate to information provided by the appellant to the authors of those reports. These were the correctional supervision report and the probation officer's report. Both of these pre-sentence reports were ruled inadmissible to the extent that they contained information obtained by the authors thereof from the appellant as she was not going to testify.

[6] With respect to some of the contents of the probation officer's report, the State indicated that some of the evidence it intended to rely on in aggravation of sentence, which was obtained during its compilation would be covered by Mr Harilal, the chief executive officer (CEO) of ECT. The State accordingly asked for the provisional admission of that evidence pending Mr Harilal's evidence. The State had also obtained the appellant's gambling records. Using the information contained in the gambling records, it prepared a summary of winnings and losses in respect of the

appellant's gambling activities and it was indicated to the court that Mr Harilal would also give evidence in relation to the contents of that document. There was no objection from the defence in the admission of the said document which was accordingly admitted into the record.

[7] In mitigation of sentence the defence introduced a document which was said to be an acknowledgment of debt by the appellant which was made an order of court by the High Court. A cursory look at that acknowledgment of debt reveals that the appellant acknowledged that she was indebted to ECT in the sum of R2 696 859.98 in what she referred to therein as compensation for damage she caused ECT by reason of her theft, fraud, dishonesty and misconduct. She explained in that document that she had deposited monies meant for ECT's creditors into her personal bank accounts from the ECT's bank account between 2009 and 2014. She agreed to the payment of her Alexander Forbes Retirement Fund benefits to ECT. That document is dated 4 December 2014. With all the formalities having been dealt with, the attorney for the appellant confirmed that she was not going to tender any evidence whatsoever, and that submissions in mitigation of sentence would be presented on her behalf.

[8] The State, prior to the submissions in mitigation of sentence being made, called its witness, Mr Harilal, to testify in aggravation of sentence. He testified that he was the CEO of ECT having commenced his duties as such in May 2019. He explained that ECT is a skills development training centre training candidates enrolled for learnerships and artisanship in bricklaying, carpeting, plumbing, electrical, welding and fitting and turning. They are a registered Technical and Vocational Education and Training (TVET) college in the private sector. Their funding is received mainly from the various Sector Education and Training Authorities (SETAs). However, they

are a non-profit organisation. They also receive some funding from their “blue chip” clients in the private sector as the funding from the SETAs is not guaranteed. These companies send their apprentices to ECT to do their apprenticeship for practical training which then pay for each learner or apprentice they send. They also have buildings that they rent out to supplement their income. Because of the uncertainty in respect of some of their income streams, they built up a reserve fund to cushion themselves in the event of a dry spell in income.

[9] Mr Harilal testified that he had never personally met the appellant before. He said that based on the records of ECT to which he had regard, the appellant started working for ECT in 2004 earning a gross salary of R8 777.99 per month. She received an annual increment from 2005 to 2013 and that in 2013 she earned a gross monthly salary of R16 196.31.

[10] She resigned in September 2014. Between 2004 when she started working for ECT, to 2014 when she resigned the appellant had siphoned off R13 460 236.05. ECT became aware that something was wrong with their finances when they needed to place adverts for recruitment of learners and staff in a local newspaper in 2014. However, they were advised by the newspaper that there was a hold placed on their account with the said newspaper. This was brought to the attention of the finance manager who then conducted an investigation. He discovered that the account of the newspaper had not been paid. Incidentally the appellant went on sick leave at the time. Further investigations revealed that a lot more creditors had not been paid. The appellant asked for an early retirement at that point. Her request was refused and instead she was served with a notice for a disciplinary hearing. It transpired that the appellant had left for KwaZulu Natal resulting in the disciplinary hearing being held in her absence. She was found guilty in absentia and dismissed.

[11] Mr Harrilal explained that the acknowledgment of debt resulted in a court order being obtained at the High Court against the appellant which was for an amount in excess of R2 million. The said amount represented the findings of their preliminary investigations and the figures the appellant admitted to not having paid to their creditors which she acknowledged to have misappropriated from 2009 to 2014. They later obtained the services of auditors who conducted a forensic audit and discovered that in fact an amount in excess of R13 million had actually been defrauded by the appellant since 2004. The amount they actually received from her provident fund was R740 037.29. The proceeds of the sale of the appellant's house that they received was R550 000.00 thus recovering a total sum of R1 290 037.29. This meant that there was a short fall of about R12 million in respect of the actual loss.

[12] Mr Harilal testified that this loss had a huge impact on their finances. It placed ECT in a very difficult position with their creditors and suppliers some of whom they had had good trading relations with for 38 years. It was through those good trading relations that good trading terms were extended to them in the form of accounts and even trading discounts. Those good trading relations were jeopardised because of the misappropriation of funds as the accounts were put on hold as a result of ETC's failure to service them. In some instances, ECT was forced to pay cash immediately after receiving services from the creditors instead of paying after 30 days of being invoiced. This led to a cash flow problem as they were required to pay cash over the counter when goods were collected or delivered which was previously not the case. Previously they would issue an order number which guaranteed payment and the goods so ordered would be delivered or made available for collection. As a result of the misappropriation of funds by the appellant this dispensation changed as they had

to pay cash on placement of the order or on delivery in circumstances in which ECT would not have yet been paid as SETAs paid them in arrears on a monthly basis.

[13] Some of the impact of the appellant's fraudulent activities were that many creditors or suppliers closed their accounts. The staff could not be granted salary increases for 2018, 2019 and 2020 as ECT simply did not have the money. They had to cut their expenses in order to ensure that they were able to pay cash for their operational expenses, which affected their employees who could not receive salary increases. This created a lot of unhappiness amongst their staff. They had a complement of 36 permanent employees and about 20 who were employed on a project basis depending on a project that they would be working on until the end of that particular project. He testified that the year 2020 was particularly hard because of the covid 19 pandemic which forced them to stop their daily activities. During certain periods staff members did not receive salaries because of the lockdown which was resultant from the pandemic. When the locked down eased to level 4 they could allow staff to return to work albeit on a 50% salary basis until April 2021 when things began to normalize.

[14] He testified that had the monies in excess of R13 million not been misappropriated, the pandemic would have found them in a stronger contingency financial reserve position. This would have placed them in a much more healthier liquidity position to better deal with the effects of the pandemic. They had to place a moratorium on staff replacements when some staff members retired because of their dire financial position, and their succession planning was also negatively affected in terms of a human resource planning for seamless continuity. They also had to place a moratorium on their capital expenditure. As a result, they could not update their technical equipment with the result that they were not able to service some of their

customers as their equipment was outdated. This resulted in ECT losing some of its longstanding clients which compounded their cash flow problems.

[15] Mr Harilal was referred to the gambling records of the appellant which reflected that for the period 2007 to May 2015 she made a loss of about R4.1 million and had winnings of R10.2 million thus making net winnings of just over R6 million. He testified that none of those monies were paid to ECT in the form of reimbursement save for the provident fund of about R740 000 and the proceeds of the sale of her house in the sum of R550 000.00.

[16] Under cross-examination Mr Harilal testified that as he started working for ECT in 2019, his evidence in respect of what happened before 2019 was information he prepared after having discussions with different staff members who were present at the time. One of their difficulties was that in 2019 they had to get an overdraft of R1 million. If the funds that were misappropriated were not misappropriated they would not have needed an overdraft. At this stage of the cross-examination the attorney for the appellant indicated to the court that Mr Harrilal's evidence related to some activities that took place before he joined ECT based on what other people told him and the documents he had access to. Those documents were not made available to the defence so that the evidence of the witness could be tested regarding the alleged precarious financial position of ECT.

[17] The submission went on to suggest that there were no financial statements or bank statements that would show that ECT was impacted by the misappropriation of funds by the appellant. On this aspect the State contended quite strongly that the appellant pleaded guilty to having defrauded ECT an amount in excess of R13 million. Logically that would have had an impact in the financial liquidity of ECT as

Mr Harilal had testified. That did not need documents to be understood. Even if bank statements were provided for the relevant period, so the submission continued, those documents would be of no much use. What would be interrogated in those financial statements would in fact be the fraud which the appellant acknowledged. It was further contended by the State that even though Mr Harilal did not work at ECT at the time the monies were stolen, nothing changed the fact that the loss or misappropriation was not in dispute and appellant had pleaded guilty. Therefore, so contended the State, contended the documents would not assist the defence in cross-examining Mr Harilal. The court was not establishing her guilt as she had been convicted already, so went the argument. It was further argued on behalf of the appellant that the request for documents had nothing to do with cross-examination but it had everything to do with the fair trial right of the appellant. She was being prejudiced by not being allowed to see the documents so that the impact of the fraud Mr Harilal testified about could be verified.

[18] This debate soon became more about some of the pre-sentence reports especially the information obtained by the authors of some of the reports to the extent that the information contained therein was obtained from some ECT's employees, especially Ms Harker. Sight should not be lost about the fact that the State had indicated that the evidence pertaining to the information that was obtained from her would be covered by Mr Harilal. I am mentioning this debate as the question of some of Mr Harilal's evidence is one of the bases of the appeal against sentence, the contention being that it was hearsay and therefore, its admission a misdirection. Notably, the report included information obtained in the compilation of the probation officer's report from Ms Harker who was at some stage, an employee of ECT.

[19] That information indicated that the offences committed by the appellant negatively impacted ECT and how that impact was experienced as Mr Harilal had testified. On further cross-examination Mr Harilal confirmed that one of the people he spoke to regarding the evidence that he gave was Ms Harker who was ECT's accountant. He testified that he did not know Ms Harker as she was there before he joined ECT in 2019. He explained that he did not know when Ms Harker started working at ECT and therefore it could be possible that she started working there after the appellant had already left. The issue raised was that Mr Harilal was being led by the State to give evidence about what Ms Harker told the probation officer. Unfortunately, no ruling was made by the presiding officer regarding Mr Harilal's evidence regard being had to its hearsay nature. At the conclusion of the testimony of Mr Harilal the State closed its case in respect of the evidence in aggravation of sentence.

[20] It is clear from the evidence of Mr Harilal that much of what he said is what he read from the documents he had access to as CEO of the ECT. Some of those documents are not part of the record that was before the court a quo when it sentenced the appellant. One of the documents that were admitted into the record for purposes of assisting the court in its task of determining an appropriate sentence was the probation officer's report. I consider it prudent to refer to the portion of that document about which it had been indicated, would be covered by Mr Harilal when he testified especially the information given to the probation officer by Ms Harker to which Mr Harilal alluded when he testified about the impact of the appellant's fraudulent activities to ECT.

[21] The probation officer's report on victim impact statement reads:

"According to Ms Harker during her employment the accused upheld a professional conduct with both her client and colleagues. She was a loyal and diligent employee. She further articulated that the R13 460 236.05 was misappropriated due to the accused fraudulent actions and 1 290 037.29 was recovered from her provident fund and the proceeds of the sale of her property. She elaborated that the accused was on sick leave during which certain creditors queried payments. Investigation revealed that creditors were on payment list, but details of creditor's banking details were changed, and monies instead were deposited into accused's bank accounts.

She indicated that the accused actions had an extremely negative effect on the company finances, as a result they had no contingency funds. The company suffered cash flow shortages, since due to the accused actions all the companies profit flowed out of the business. This stopped the company's expansion and capitalisation. In 2020 during the Covid 19 pandemic regulations some employees left the company, while others had to take early retirement and could not pay people to work from home.

She further elaborated that the remaining staff were devastated since annual increments was affected due to financial position of the organisation. This has also resulted with extremely low staff morale for the remaining staff.

Ms Harker reported that the accused actions and behaviour also lead to the company incurring more costs as preventative measures, however it is difficult to quantify the cost. The company conducted forensic [investigations] and recommendation implemented, stricter controls with releasing funds.

The company believes that her actions were actuated by greed and the illicit gains. Therefore, they request the court to impose the maximum term of imprisonment because of the seriousness of the offence and the impact the fraud has on company."

[22] As the appellant's attorney had indicated, the appellant indeed did not tender any evidence in mitigation of sentence. Instead, submissions were made on her behalf. It was submitted that the appellant would be turning 65 years old in the following three months. Therefore, her chances of finding employment in which she would have to deal with money or financial transactions were non-existent. The point made being that it was not necessary for her to be given a custodial sentence.

It was submitted that she was an older person as defined in the Older Persons Act 13 of 2006. She has been unemployed since her resignation in 2014. She suffered from hypertension and high cholesterol. She had a clean record as she was a first offender. She had been employed at ECT for 31 years and had agreed to reimburse the complainant from her provident fund and from the proceeds of the sale of her house.

[23] Indeed, the complainant, ECT was reimbursed in the sum of R1 290 037.29. This resulted in the appellant being destitute with no house, no pension, no job and no future. It was submitted that it was not being argued that she should not be punished for her crimes, but that a term of imprisonment would be inappropriate. It was submitted that in light of her personal circumstances, a suspended sentence would be the appropriate form of punishment. She had expressed remorse and regret for her actions. It was further submitted that it was indeed so that she had stolen a lot of money which she was not in a position to repay as she was living on a government grant. Furthermore, so the submission went, her gambling problem was admittedly an aggravating factor as was the fact that only a fraction of the money she stole was recovered. That being the case, the defence persisted with the contention that the circumstances of the case called for a suspended sentence so that if she committed a similar offence or any offence in which dishonesty is an element, she would then go to prison.

[24] The State's submissions in aggravation of sentence were the following. The fact that the appellant was an old person at the age of 65 or that she was a first offender did not exempt her from direct imprisonment. It was submitted that the appellant's health conditions, that is, hypertension and hyperlipidaemia or high cholesterol, were dealt with in the correctional supervision report. In that report it was indicated that if

the court sentenced the appellant to custodial sentence the correctional facilities would be able to make medication available for her illnesses. With regard to her being destitute the State submitted that she had no one else but herself to blame for that situation. She had been receiving annual increases in a good job that she had when she started committing the offences. She started with her fraudulent activities in 2004 and continued to 2005 but in 2006 she did not defraud her employer at all. But from 2007 onwards her fraudulent activities escalated with the appellant misappropriating larger amounts of money and in 2013 alone she took R2.3 million from her employer.

[25] There was no explanation proferred by the appellant on why she committed those offences as she refused to give evidence in mitigation of sentence. It was submitted that she did not have a gambling problem that her gambling records revealed that she had gambling victories in which her gambling was more like a business. The appellant had not explained her gambling activities in court despite siphoning off over R13 million from her employer over the period. The State contended that the appellant made money with the money she stole from ECT. The sum of R13 million and her net winnings of over R6 million amount to about R19 million. With that in mind the submission about her being destitute was perplexing and she deserved to be punished. She indeed does have a clean record, however, her 972 counts of fraud diminished all of that. Even the amount of money received from her provident fund and the proceeds from the sale of her house leave about R12 million which she has not paid.

[26] The State submitted that the case of *Nel*[1] explained the legal position where gambling was a factor as follows:

[1] S v Nel 2007 (2) SACR 481 (SCA) 51; [2007] 4 All SA 709 (SCA) para 16.

"A gambling addiction, like alcohol or drug addition, can never operate as an excuse for the commission of an offence. In *S v Sithole* 2003 (1) SACR 326 (SCA) this court found that alcohol addiction cannot be an excuse for driving under the influence of alcohol. Conradie JA stated at 329g-h:

> '[7] Courts in this country have long acknowledged that alcohol addiction is a disease and that it would be to the benefit of society and the offender if the condition can be cured. But it is necessary to make it the obvious point that drunken driving is not a disease. One is distressingly familiar with maudlin pleas in mitigation that the drunken driver in the dock is an alcoholic, as if the disease excused the crime. It does not.'

What is more, a reading of *R v Petrovic* [1998] (supra) reveals that it does not support the approach in *Wasserman*. That case, like *Wasserman* and this case, had to do with a pathological gambler who had committed crimes actuated by the addiction (the offences in *Petrovic* ranged from theft to fraud). Delivering the main judgment, Charles JA stated:

> '20. The fact that an offender was motivated to the commission of the crimes in question by an addiction to gambling will, no doubt usually be relevant, and may be an important consideration for a judge sentencing the offender for these crimes. But as Tagdell, JA said in *R v Cavallin* (…) "It is … important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that count, necessarily be immune from punishment by imprisonment."
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> 21. It is considerations such as these which have led this Court to say more than once that it will be a rare case indeed where an offender can properly call for mitigation of penalty on the ground that the crime was committed to feed a gambling addiction; …'

The ratio is thus clear whilst a gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case), it cannot on its own immune an offender from direct imprisonment. Nor indeed can it on its own be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from the prescribed sentences, in the words of Stephen Terblanche in South African Journal of Criminal Justice (2004) 17 at 443 who, correctly in my view, criticises the approach in *Wasserman*."

[27] It was submitted that while the appellant gambled, there was no evidence of addiction. She had successes in her gambling activities making herself richer using her employer's money.

[28] The appellant did not come before court and express her remorse by way of giving evidence. Submissions in that regard were made by her legal representative. The only thing indicative of remorse, so went the submission, was the plea of guilty. In that regard the court *a quo* was referred to the case of *Landau*[2] in which the court said:

> "Courts often see as significant the fact that an accused chooses to 'plead guilty'. This is sometimes regarded as an expression of on the part of the accused of genuine co-operation, remorse and a desire not to 'waste the time of the court' in defending the indefensible. In certain instances, a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the 'writing is on the wall and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of [sentence] unless accompanied by genuine and demonstrable expression of remorse …"

[29] Relying on *Nel*, the State argued that there was no demonstrable expression of remorse. As the State had submitted in the court *a quo* the repayment of the little amount that was repaid could not come to the aid of the appellant as she was being sued. The plea of guilty was also of no assistance to her because the monies that were defrauded from ECT were transferred into her bank accounts or accounts that were under her control. It was submitted that neither the repayment nor the plea of guilty would entitle her to mitigation of the sentence. The evidence against her was overwhelming in that the money ended up in her bank accounts or bank accounts that were under her control. The appellant was in a position of trust and she

[2] S v Landau 2000 (2) SACR 673 at 678 b-c.

committed the offences for which she has been convicted when she acted in breach of the trust reposed to her by her employer. As was stated in the case of *Rawat*[3] where the court said that "an employee's breach of trust warrants severe punishment", the fact that the appellant was in a position of trust vis-a-vis her employer was an aggravating factor.

[30] Lastly, the State submitted that the impact of the appellant's fraudulent conduct caused devastation to her employer which she left for others to suffer from when she left the company. The State referred to the cost cutting measures that had to be embarked upon. Innocent employees were denied annual increases which on its own showed the effects of the appellant's actions on others. Costs had to be incurred in commissioning a forensic audit in order to determine the magnitude of the loss caused by the appellant to her employer. The State submitted that despite the appellant knowing that she had been defrauding her employer since 2004 she signed an acknowledgment of debt in which she agreed to the amount that was known to the employer as having been stolen by her during that period. She knowingly allowed the wrong impression to be created that her fraudulent activities started in 2009 and ended in 2014 when she resigned when the correct state of affairs was known to her. Even for that period she had stolen monies in excess of R10 million. Despite that knowledge she acknowledged a paltry R2.6 million and thus continued with her dishonesty. In the final analysis the State's contention was that there was nothing in her personal circumstances that mitigated her punishment and that a suspended sentence would make a mockery of the criminal justice system. The State argued for the imposition of a sentence of 15 years imprisonment. It accepted that indeed she was a suitable candidate for correctional

[3] S v Rawat 1999 (2) SACR 398 at 402.

supervision but added that that did not make it a suitable sentence in light of the aggravating factors.

[31] In considering an appropriate sentence to be imposed, the court *a quo, inter alia,* referred to the evidence of Mr Harilal. His evidence has already been set out elsewhere in this judgment and therefore I will not be recapitulating it now to avoid repetitiveness.

[32] The court *a quo* did a commendable job in summarising the essential features of all the personal circumstances of the appellant which were submitted to urge the court to pass a non-custodial sentence. Thereafter the court correctly rejected the submission that a non-custodial sentence was appropriate regard being had to the seriousness of the offence, the appellant's continued deviousness and the prevalence of this type of crime in our society. However, there are some areas of concern about how the court *a quo* dealt with some of the issues pertinent to its conclusions on an appropriate sentence.

[33] The first of those issues is that of hearsay evidence. It appears from its judgment that the court *a quo*'s approach was that the portions of the correctional supervision and the probation officer's reports about which there was agreement between the State and the defence that they were hearsay, were, on that basis, hearsay. I am not, at this stage, and for the purposes of this judgment, dealing with whether or not the parties correctly agreed about the hearsay nature of that evidence. The point being made is simply that, hearsay evidence is hearsay evidence, if the person on whose credibility it relies is not called to testify. This has nothing to do with the agreement *inter partes* so to speak. Section 3 (4) of the Law of Evidence Amendment Act 45 of 1988 (the Act) defines hearsay evidence as

evidence whether oral or in writing the probative value of which depends upon the credibility of any person other than the person giving such evidence.

[34] It is clear from the evidence of Mr Harilal that for some of his evidence he relied on ECT's company records which he had access to in his capacity as CEO. It is not in dispute that at all material times during the commission of the offences he was not in the employ of the company. At the time when the creditors of ETC placed its accounts on hold, closed its accounts and at times ECT was forced to make over the counter cash payments for services to be rendered, he was not with ECT. The question is, where did he get this information? In his evidence, Mr Harilal answered this question by referring to unspecified company records. He also mentioned that he personally spoke to some of his colleagues whom he also did not mention by name. In other words, it is unclear who told him which information, what position in the company that person or those persons held in the company, which information was gleaned from which records as against which information was gleaned from what other people or colleagues told him. What is clear from the appeal record especially from the pre-sentence reports, is that some information found its way into the pre-sentence reports having been obtained from Mrs Botha and Ms Harker.

[35] In fact, it was argued before this Court on behalf of the State that the appellant was aware that Mr Harilal would cover in his evidence, the contents of paragraph 13 of the probation officer's report. Paragraph 13 of the probation officer's report deals with victim impact statement. Therein the probation officer deals with what Ms Harker told him. I have already quoted the contents of the said report above as at it relates to the impact of the appellant's fraudulent activities on ECT and its employees.

[36] It seems to me that Mr Harilal did no more than being Ms Harker's mouth piece if the similarities between his evidence and the contents of the probation officer's report are anything to go by. In fact, it would seem that very little, if anything at all, was gleaned from the company records by Mr Harilal. It may very well be that it was in fact Ms Harker who actually had regard to the company records. Even worse, the information that found its way into the pre-sentence reports may all have been elicited from Ms Botha who, according to the probation officer's report, was ETC's human resource officer and Ms Harker who was the finance officer. This begs the obvious question – did the probative value of the information contained in the probation officer's report depend on Mr Harilal? The answer is a resounding no. It is unclear why the State chose to call Mr Harilal to testify. Not only was he not at ECT when all the relevant events unfolded but also he never spoke to the probation officer or contributed in the compilation of the pre-sentence reports.

[37] The two ECT's employees, Mrs Botha and Ms Harker who gave information to the probation officer were surprisingly not called. Instead, Mr Harilal was called to deal with paragraph 13 of the probation officer's report in circumstances in which he had no contribution to the information contained therein. There is no basis for any suggestion that he would have had personal knowledge of any of the things about which Mrs Botha and Ms Harker gave information to the probation officer. This is a classical case of hearsay evidence being allowed without any basis for doing so. No explanation was given by the State why Ms Harker or Mrs Botha for that matter, were not called to testify. This would have been for the same reason that the evidence of what the appellant told the probation officer was ruled as hearsay on the basis that the appellant was not going to testify as the person who told the probation officer about that relevant information which the found its way into the report.

[38] The fact that there may have been no objection from the defence is irrelevant. This is because section 3 (1) of the Law of Evidence Amendment Act deals with the hearsay evidence and in doing so, provides against its admission save under certain circumstances[4]. The basis on which the hearsay evidence of Mr Harilal's was admitted was not explained even as the court dealt with Mr Harilal's evidence and obviously took it into account when it determined the sentence it then imposed on the appellant.

[39] In *Rautini*[5] the court said:

> "It is common cause that the respondent's counsel made no application for any of the hearsay evidence to be admitted in terms of s3 of the Law of Evidence Amendment Act. In the circumstances, the full court's finding that material differences existed between the appellant's version and the medical records regarding where he fell from the train, the cause of his fall and his first lucid recollection after the fall was erroneous. The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it."

[40] There can be no doubt that the court *a quo*'s admission of the hearsay evidence of Mr Harilal was a material misdirection. That evidence would have been considered by the court for the purpose for which it was led, the imposition of what it considered to be the maximum permissible sentence it could impose. In imposing

[4] Section 3 (1) reads: Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings,
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to –
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(v) any prejudice to a party which the admission of such evidence might entail; and
(vi) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[5] Rautini v Passenger Rail Agency of South Africa (853/2020) [2021] ZASCA 158 (8 November 2021) para 12.

the sentence it did, the court *a quo* said it considered the mitigating circumstances of the appellant and the aggravating circumstances. It then said that it considered the seriousness of the offence and the impact the offence had on the company or complainant. The court thereafter imposed 15 years imprisonment saying:

> "The total amount involved here is R13 460 236.05 but there is no individual amount above R500 000.00 where a minimum sentence of 15 years imprisonment would have been applicable. However, where fraud of amounts in excess of R500 000.00 whether individual or not 15 years imprisonment should be used as a yardstick to determine an appropriate term of imprisonment."

[41] In *Hewitt*[6] the court restated the principle of our criminal jurisprudence on sentencing as follows:

> "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that chosen by the trial court is not. Thus the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

[42] In *casu* the extent of the influence of the hearsay evidence led, impermissibly so, by Mr Harilal, the only evidence in aggravation of sentence the State led will never be known. What is clear though is that there was a material misdirection which contributed materially if it did not lead to the imposition of what the court said would have been a minimum sentence of 15 years, which it said would have been

[6] S v Hewitt 2017 (1) SACR 309 (SCA) at para 8.

applicable but for the fact that no individual amount above R500 000.00 was defrauded. That misdirection, the admission of hearsay evidence, with no explanation as to why it was considered to be admissible, suggests that that evidence influenced materially, the court in its exercise of the sentencing discretion. That must mean that the court improperly exercised its discretion partly influenced by the hearsay evidence of Mr Harilal.

[43] There is no doubt that for serious offences such as the ones committed by the appellant a custodial sentence is the only appropriate sentence. I understood Mr Hattingh, counsel for the appellant, to be conceding that a direct sentence of imprisonment is appropriate. That concession was well made. He however, argued for what he called a much shorter period of imprisonment than the 15 years that has been imposed. There is something else that I find concerning regarding the sentence proceedings in the court *a quo*. The record shows that the attorney for the appellant tried to make submissions in mitigation of sentence also on the basis that the minimum sentence was applicable. The court stopped him from doing so on the basis that the minimum sentence was not applicable.

[44] However, in imposing the sentence, the court, in explaining how the sentence of 15 years was appropriate, said that for fraud of amounts in excess of R500 000.00 whether individually or not, 15 years should be used as a yardstick. If the court considered that the considerations in which minimum sentence of 15 years are applicable, even if as a yardstick, it ought not to have dissuaded the legal representative of the appellant from making submissions on the basis that it was applicable without an appropriate indication that it would use that yardstick. The interfence by the court in that regard amounted to a serious misdirection because the court, after not being too keen on hearing submissions about minimum sentence

considerations, it in any event took those considerations into account. That would have alerted the appellant's attorney to the approach the court intended to adopt. He probably would have adjusted his submissions accordingly.

[45] In a somewhat similar situation, of course with different nuances, Olivier JA expressed himself as follows in *Jimenez*[7] in which the court said:

> "The problem with the judgment of the Court *a quo* lies in that part quoted in para [9] hereof, and in particular in the reference to *S v Homareda* 1999 (2) SACR 319 (W). The point is that the sentence in *Homareda* was based upon the application of the relevant minimum sentence provisions. In general, it is not permissible to have regard, without the necessary caveats, qualifications and distinctions, to sentences imposed on the strength of minimum sentence provisions in a case where the minimum provisions are not applicable. The point of departure in prescribing maximum and minimum sentence provisions differs substantially from that applicable to cases where no such provisions are prescribed; and equating without the necessary caveats, qualifications and distinctions the reasoning of the one with the other will often not be valid. (See also the arguments in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222)). In this case, the Court *a quo* can be said to have erred and misdirected itself.
>
> But it is trite law that a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with a sentence imposed by a lower court:
>
> > '(I)t must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684 (B–C) one that "dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh."'

[46] In this case the appellant was born in 1957. Therefore, she was almost 64 years old at the time she was sentenced. It is not in dispute that she suffers from hyperlipidemia and hypertension for which she is receiving treatment. She was a

[7] S v Jimenez 2003 (1) SACR 507 (SCA) 517 paras 12 to 13.

first offender at the age of about 47 years when she started with her very serious criminal behaviour and about 63 years old at the time she was convicted. It is so that she pleaded guilty. The State's criticism of only earlier admitting to a lesser amount and signing an acknowledgment of debt of R2 696 859.98 in respect of fraud she committed between 2009 and 2014 when she knew that her criminal conduct started about 5 years earlier in 2005 is correct. This speaks to her deviousness for which she deserves serious punishment. Even the plea of guilty in circumstances in which she stood no chance of being acquitted anyway is not necessarily praiseworthy. However, the approach of the court *a quo* in sentencing the appellant is the kind of misdirection that inferentially suggests that it did not exercise its sentencing discretion properly. It did not explain why the sentence of 15 years was considered appropriate beyond the fact that that period was suggested by the State and that it understood 15 years to be the yardstick even though it was inapplicable as a minimum sentence.

[47] This is in addition to the misdirection of allowing hearsay evidence to be led and considering it as it did when deciding which sentence would be appropriate. This suggests that the court *a quo* had made up its mind that it must sentence the appellant to the sentence which it called the yardstick. In doing so, it did not take into account the very relevant mitigating factors which ought to have been factored in, in the consideration of an appropriate sentence. It could then reject them with an appropriate explanation for doing so. While the offences committed by the appellant are very serious and prevalent in our society, that does not mean that all accused persons who are convicted of fraud where the amount involved is in excess of R500 000.00, whether cumulative or individually, must routinely be sentenced to 15

years imprisonment. That sentence in this case induces a sense of shock and must be interfered with. That being the case the appeal must succeed.

[48] In the result the following order shall issue:

1. The appeal against sentence is upheld.

2. The sentence of 15 years imprisonment imposed by the court *a quo* is set aside and substituted with the following sentence:

   2.1. The appellant is sentenced to 10 years imprisonment

   2.2 The sentence referred to in 2.1 above is antedated to 25 August 2021.

_____

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree

_____

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant: A. HATTINGH

Instructed by: SWARTS ATTORNEYS

GQEBERHA

Counsel for the Respondent: U. DE KLERK

Instructed by: DIRECTOR OF PUBLIC PROSECUTIONS

MAKHANDA

Date heard : 15 March 2023

Date delivered : 08 august 2023